

12th June 1755.

ANSWERS

F O R

John Frazer *jun.* and Alexander Duncan
Senior, Merchants in Aberdeen,

T O

The Petition of *John Couper* Merchant there, and
Thomas Ord Ship-master.

3

THe Respondents in *June* 1750, having given Commis-
sion to their Correspondents, certain Skinners in *New-*
castle, to send them a Quantity of Wooll; and the Pe-
titioner *John Couper* having then freighted a Vessel called the
Nightingale of Holyisland, the above *Thomas Ord* Master,
to carry Goods from that Port to *Aberdeen*; he, besides giving
publick Notice of the Ship's lying to for that Purpose, particu-
larly applied to the said Skinners, to put aboard of his Vessel
such Wooll as they had Occasion to send down, promising to take
particular Care of it; and accordingly they were prevailed
upon to let him have the Respondents Wooll, which, with o-
ther Consignments of the same Kind, was shipp'd aboard the said
Vessel for *Aberdeen*.

As the Profits that accrued to Mr. *Couper* the Freighter, de-
pended on the Quantity of the Goods stowed in the Ship, so,
from an exorbitant Desire of Gain, he resolved to cram every
Corner of the Vessel, and load both below Deck and above, in-
side and outside, with as much as he could fix upon it. And,

A

as

as this Procedure seem'd extraordinary to the Master, who was not in Use of seeing Goods exposed to the Injuries of the Sea and Weather, he very naturally and justly remonstrated against it : But Mr. *Couper* insisting to have a large Part of the Wooll stowed on the Deck and Quarters, the Master was at length prevailed upon to consent ; though highly sensible of the imminent Danger such Wooll would necessarily be exposed to, he took care to stipulate, *that he, the Master, was to run no Risk in so doing.*

Mr. *Couper*, having thus removed the Difficulty occasioned by the Master's Opposition, did not fail to make good Use of the Licence he had obtained for Prosecution of his lucrative Scheme ; and accordingly, after filling the Hold of the Ship, he put aboard no less than eighteen Packs of Wooll, the one Half of which he found Means to croud upon Deck, and the other Half he disposed of on the outside of the Ship, lashed over-board to the Rails and Stenchons ; and the Vessel thus equipt, on the 24th of *June*, put to Sea on her Voyage for *Aberdeen*.

So far the Freighter's Project was successful : The Master's Allowance was to receive no Increase, altho' the Ship was loaded, and harnessed outside and in, while equal Profits were expected by the Freighter from the whole Stowage indiscriminately. However, a short Time proved the Justice of the Master's Opposition to this Manner of loading, and the Prudence of his Stipulation with Mr. *Couper*, that he should not run the Risk of this Outside-cargo ; for as it is natural to suppose, that in the ordinary course of sailing, the Wooll-packs lashed on the outside of the Ship, would frequently dip into the Sea, and by sucking in the Water like a Sponge, immediately double or triple their Weight, so it can scarcely be imagined, that so weak a Support as the Rails of a little coasting Vessel would long sustain it : And accordingly it appears, that so soon as two Days after sailing from *Newcastle*, a Gale of Wind springing up, and occasioning a high Sea, the Weight of the Packs being increased by the
breaking

breaking of a Wave, the whole Rails at once gave Way, and together with all the Wooll thus lashed to them, fell into the Sea, and was irrecoverably lost.

Such was the Issue of this hopeful Scheme, and by a Management which the Respondent cannot avoid pointing out to your Lordships, as carrying at least a suspicious Appearance, no less than seven of the nine Packs of Wooll thus lost belonged to the Respondents; at the same Time a Number, the Property of *William Couper* the Father of this Freighter, were carefully lodged in the Hold, and only two Packs of his left out of it, and these stowed upon Deck, where all remained safe, while the whole that was lashed over board perished together in a Moment. And at any Rate it must be acknowledged, that if a large Part of the Cargo was to be stowed securely, and the Remainder placed apparently in the most hazardous Situation, a Freighter, who intended to have done Justice to his Employers, would not have failed to have put their Goods in the Place of Safety, and disposed of what might be called his own, in that of Danger.

This however being the Fate of the Respondents Goods, they thereupon brought their Action against *Ord* the Master, before the Magistrates of *Aberdeen*, as Vice-Admiral Deputes, for Reparation of their Loss, to which Process *Couper* the Freighter was afterwards made a Party, and in the Course of it acknowledged, ' that he freighted the Ship, and acquainted every Person he knew, who traded betwixt *Newcastle* and *Aberdeen*, if they had any Goods, to put them aboard; ' that after the Hold was filled, Eighteen Packs of Wooll ' which remained of the fifty-nine contained in the Licence ' taken out from the Customhouse, were turned upon Deck and ' stowed there, and at the Quarters, as above mentioned; and ' that, although the Master gave no Bill of Loading, (as such Bills are not ordinarily given for Wooll shipt at *Newcastle*, except in Time of War when Insurance is made) ' yet in Fact, ' seven of the nine Packs lost at Sea were the Property of the
Re.

Respondents, and of *Hary Tytler*, from whom they derive Right.

And further, *Ord* the Master being examined upon Oath, *inter alia* deponed, ' That while the Ship was loading at *Newcastle*, *Couper* the Freighter, with some other Gentlemen whom he knew not, came on board his Ship, and looked into the Hold, in order to compute what Wooll she would stow, and they gave it as their Opinion, *that fifty Packs of Wooll could be stowed in the Hold, and nine upon the Quarter Deck*. That he objected against taking any Wooll upon his Deck, because he had only freighted the Hold of his Ship, and not the Quarters, and if he received any Wooll upon his Deck, he ought to have the Freight of it to himself; but Mr. *Couper* (the Freighter) insisting that it was ordinary for all Ships to carry Wooll upon their Deck for the Freighter's Account, and having advised with *Charles Leys* Shipmaster in *Aberdeen*, then at *Newcastle*, to whom Mr. *Couper* carried him, and Mr. *Leys* telling him that it was a customary thing for Ships to carry Wooll on their Deck for the Freighter's Account, the Deponent agreed to it, but told Mr. *Couper* at the same Time, *that he the Deponent was to run no Risk in so doing*. To this he adds, in his Defences before the inferior Court as to this Point, ' That Mr. *Leys* told him that no Shipmaster was ever liable for any Risk anent such Bags so stowed, neither did they give any Receipts or Bills of Loading therefore; and he the Master being a mere Stranger to such Practices, complied with the Freighter, who ordered these Bags to be lashed on the Quarters, which the Freighter directed and seed done.' And in his Oath he likewise proves what is above mentioned, as to the Number of the Packs so disposed, deponing, ' *that after the Hold was full, the Labourers who had wrought in the Hold of the Ship stowing the Wooll, turned eighteen Packs of Wooll from the Key upon the Deck of the Ship, and that after the Wooll was on the Deck he secured the same next Morning on his Quarters, outside and inside*. Whence
it

it appears, that double the Quantity that had been agreed on by the Persons whom the Freighter had brought to view the Ship, were so disposed of, which amounts likewise to a pretty strong Proof, that these Visitors, whoever they were, in making their Estimation, had no View to lashing the Wooll, on the outside of the Quarters, but only on the inside, where accordingly nine of the eighteen Packs were placed, and suffered no material Damage, and that *Couper* the Freighter must of himself have ordered the other nine Packs that were lost, to be lashed on the outside, either to make up the full Number fifty nine, upon a Deficiency of Room in the Hold, or over and above that Number, with a View to make still further Gain; and it matters not to the present Question which of the two was the Case.

Such is the material Part of the Proof before the inferior Court, relative to the shipping and disposing of the Goods on board, and after various Proceedings, which need not be here recited: The Provost and four Baillies of *Aberdeen*, being solemnly assembled for the Purpose, on the 28th of *August* 1750, pronounced the following Judgment: ‘ Find from the
 ‘ Depositions of the Master and Crew; that the said *John*
 ‘ *Couper*, as Freighter of the Ship, importuned the Master
 ‘ not only to take the Wooll on board, but also to stow such
 ‘ of it, on the out Quarters, as could not be stowed in the
 ‘ *Hold* or *Deck*, so as the said *John Couper* might get the
 ‘ Benefit of the Freight thereof. And therefore finds, the said
 ‘ *Thomas Ord* the Master, and the said *John Couper* the
 ‘ Freighter, liable conjunctly and severally, for the Value of
 ‘ such of the said Wooll, as was lashed upon the Outside of
 ‘ the Quarters of the said Ship, and was washed away by
 ‘ Accident, unless the said *Thomas Ord* and *John Couper*,
 ‘ prove, that the Skinners, or those who shipped the Wooll,
 ‘ agreed to run the Risk of such of the said Wooll as was
 ‘ lashed on the Outside of the Quarters of the said Ship, and

‘ to indemnify the Master and Freighter of any Accident that might happen thereto.’

The Respondents will beg Leave to say, that this Judgment is highly consonant with the Rules of Reason and Equity, as well as those of the Law maritime; it is pronounced with due Deliberation and Enquiry into the Circumstances of the Case, by Merchants, who, were this Question to be tried in the Courts of *England*, would be called by the learned Judges to assist them, as an experienced Jury for Determination of it; they are Gentlemen of the greatest Probity, and long Practice in Trade, and their Decision rightly supposes, the Risk of Goods exposed to uncommon Danger by a Master, or his Freighter, without any positive Agreement with the Owners, or their Agents, to ly upon such Master, or Freighter, as take upon them to place the Goods of others, in so hazardous a Situation; and therefore to take off this Obligation from the Petitioners, they allowed them a Proof of a positive Agreement, with the Persons who shipped the Wooll to undertake the Risk of what was so exposed. But as the Petitioners were conscious, that no such Agreement ever was made, they did not choose to attempt that Proof, but, in hopes of better Success here, brought the Cause into Court by an Advocation, where they endeavoured to get the Issue of the Question put upon a broader Footing; and, on the 7th of *December* 1750, the Lord *Milton* Ordinary, ‘ Allowed them a Proof before Answer; that in transporting ‘ Wooll from *Newcastle*, it was the Custom to lash the same ‘ on the outside of the Quarters of Ships; as also, that the ‘ Pursuers Correspondents were present at loading the Ship, ‘ and seed the Wooll lashed, without making any Objection.’

The Respondents now apprehended, that the Defenders would have fallen to proving in earnest; but it seems, they resolved to put that off still longer for an after Game; and therefore they proposed, in order (as they said) to save Time and Expence; that the Respondents should be ordained to
give

give Answers to a Condescendence of Facts exhibited by them; and accordingly such Condescendence and Answers being given in, the Parties joined Issue thereupon, as in a concluded Cause, and Memorials upon the Import thereof, being presented on both Sides, the Lord Ordinary, upon the 27th of *February* 1752, pronounced an Interlocutor, *Finding the Defenders, John Couper and Thomas Ord, conjunctly and severally, liable to the Pursuers, for the Value of the Wooll libelled, which was lashed to the Outside of the Ship, and washed away*: And to this Interlocutor his Lordship adhered, and refused a Representation against it.

The Defenders, however, thought proper to reclaim, and upon advising their Petition, with Answers for the Pursuers, your Lordships were pleased, on the 21st of *February* last, *To adhere to the Ordinary's Interlocutor, refuse the Desire of the Petition, and remit to his Lordship to proceed accordingly*. And the Defenders, having again applied for a Review and Alteration of the Judgment against them, the Pursuers are likewise obliged, once more, to lay their Case before your Lordships, in these Answers to this second reclaiming Petition.

And having already stated the Facts, that gave Rise to this Process, pretty fully, the Pursuers (who must now resume the Title of Respondents); humbly apprehend, that there is not much Occasion for Argument, to satisfy your Lordships of the Justice of their Claim. The Question resolves shortly into these two Heads: *1mo*, Whether the Packs of Wooll lost at Sea, were stowed in such a proper and careful Manner, as to transfer the Damage from the Master and Freighter of the Ship, to the Proprietors of the Wooll? And, *2do*, If supposing the Wooll to have been improperly stowed, yet a Proof of the Prevalence of a general Practice of such Stowage, joined to its having been, in this Case, exercised in Presence of the Merchants who shipped the Wooll, without Opposition from
them,

them, should be sufficient to throw the Loss upon the Owners of the Goods ?

And with regard to the first Point, How far the Wooll was properly stowed, the Respondents have said enough already, to shew, that the placing Goods upon the Deck of a Ship, or any where without the Hold ; but especially, the lashing these of a weighty Nature to the Rails, and hanging them over board, carries with it the highest Degree of Absurdity, impossible to be vindicated. Every Body knows, that the Burden of Ships is ascertained by the Capacity of the Hold ; and in the present Case, when *Couper* the Freighter insisted with the Master, to stow great Part of the Wooll above Deck, he answered very properly, *That he had only freighted the Hold of his Ship.* And tho' he was indeed prevailed on to agree to this dangerous Stowage, yet so sensible was he of the extraordinary Hazard such Goods must be exposed to, that he first expressly stipulated, *he should run no Risk in so doing.* One great Purpose of a Ship's Deck, is to cover and protect the Goods that are in the Hold ; and it is therefore ridiculous to say, that Goods placed below Deck, may suffer as much by the springing of a Leak, as these above by the breaking in of a Wave ; for common Sense shows, and were Instances wanting, the present would prove it ; that tho' Goods in the Hold may suffer a little by a Leak, if of a certain Quality, yet they never can be utterly lost, so long as the Vessel does not go to the Bottom ; while on the contrary, Goods above Deck may, by an accidental Wave, be in a Moment swept into the Sea, tho' the Ship continues safe, and reaches her destined Port ; and still greater is the Risk of Goods that are lashed over board to the Rails, like those of the Respondents, especially of such a Quality as Wooll, which by frequently dipping into, and sucking in the Water, so greatly increases its Weight, as to be alone sufficient to tear off the Rails, without the Aid of any hard Weather to hasten its Destruction.

In

In short, the Danger and Absurdity of such Stowage, is so apparent, that the Petitioners themselves are obliged to give up its Vindication: And when that is the Case, the Respondents can scarcely think they are in earnest, when they argue, that nevertheless a special Agreement with the Shipmaster was necessary to *throw* the Risk of these Goods upon him or his Freight; when on the other hand it is obvious, nothing less than such a special Agreement could *relieve* him of that Risk arising from such dangerous Stowage.

The Principles of Law with regard to the Obligations incumbent on Shipmasters and their Owners, obtain universally, and the whole mercantile World has agreed in requiring at their Hand double Care and Attention, for the Safety and Preservation of these Goods, whereof the Custody is committed to them. Commerce is the Parent of Wealth, and even of Conveniency to all Nations; and as in the Prosecution of it, People are obliged to trust Persons of that Profession, who are too often *levissimæ fidei homines*, it is most reasonable they should be tied down to give the strictest Attention to the Interest of their Employers. Hence Accidents and Misfortunes, that in common Cases would afford a relevant Defence, have no Weight in theirs; superior Force and unavoidable Calamities are alone available to frustrate that Claim, which the Proprietors of Goods are intitled to against Masters or Owners of Vessels, on board of which these Goods have been received; and this, says the Civilian, obtains, *quia est in ipsorum arbitrio ne quem recipiant: & nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi; cum ne nunc quidem abstineant hujusmodi fraudibus. l. i. § i. Nau. Caup.*

It is unnecessary therefore to trouble your Lordships with Authorities to establish this Point, which is so universally known and understood, especially as the Respondents, in their Answers to the first reclaiming Bill, adduced several very important. The Point here argued was established so early as the Days of the Romans, by the famous Edict, *nautæ caupones stabularii,*

stabularii, and from that Source likewise we derive the *actio exercitoria*, a Branch of the same wise Plan. All Nations have adopted these Rules, and some have improved upon them, especially the *French*, whose naval Constitutions are allowed to be excellent. Thus, in regard to the Particular now complained of, there were anciently in their Ports certain Officers, called *Arrameurs*, or Stowers, whose Business was to dispose right all Goods, Bails or Parcels brought aboard the Ship; and altho' the Master or Crew understood this Business, perhaps as well as they, they never meddled with it, being accountable if they did, for any Accident occasioned by the Stowage, *Laws of the Admiralty, vol. 1. p. 69.*

The naval Laws of *Olleron* particularly subject the Master to Damage occasioned by Errors in Stowage. And the 23d Article of the Laws of *Wisbay*, once a noted trading City in the *Baltick*, ordains, 'That if the Cargo is ill stowed, and the Ship badly trimmed, and any Damage happens thereby to the Ship or Goods, the Mariners shall be responsal for the Damages, as far as they have wherewithal to do it.' So likewise by the Sea-laws of *France*, established by *Lewis XIV.* in the 1681, *cap. 16. § 11.* it is specially enacted, 'That no Master shall load any Goods upon the Ship's Deck, without the Order or Consent of his Merchants, under the Pain of being answerable for all the Damages that may happen.' And that this holds too in the Law of *England*, appears from many Authorities, and *Molloy* in particular, when treating of Averages payable to the Proprietors of Goods thrown over board, says, 'That if it falls out, the Ship or Vessel, by the indiscreet stowing or loading the Ship, above the Birth-mark, such Ejection happen, in that Case it has been used by the maritime Laws, no Contribution to be made, but Satisfaction is to be answered by the Shipmaster or Owners.' And surely, where Goods misplaced are not thrown, but washed over board, much greater Reason is there, that these who had the Care of them should sustain the Loss.

The

The Petitioners therefore are extremely wrong in arguing, that this Obligation on the Master and Owners, amounts to an absolute Insurance; for properly Insurance begins, where that Obligation ends, as it is calculated to indemnify the Proprietors of Goods, in the Event of a total Loss by Capture or Shipwreck; whereas the Master and Freighter's Obligation extends no further than the Reparation of such partial Loss or Damage as the Goods sustain by improper Stowage, or being otherwise exposed to uncommon Danger through their Fault or Negligence: And as it is at all times in their Power to refuse such Goods, as they have not Room for in the proper Place, if they, from Desire of Gain, chuse to take more, and place them above Deck, or hang them over board, as in the present Case, then if they arrive in Safety, all is well, and they reap the Profits of their Adventure; and on the other hand, if the Goods are damnified or lost by the Way, *sibi imputent*, they have their own Rashness to blame, and must therefore pay the due Price of their Folly.

So much the Respondents apprehend is sufficient to prove the first and material Point in their Favour, ' That the Wooll ' having been improperly stowed, the Damage ought to fall ' on the Master and Freighter.' And as to the second Point, ' Whether the general Practice of stowing Wooll in that Man- ' ner, if proved, is sufficient to throw the Risk on the Pro- ' prietors,' little Argument may suffice to show that it is not: For admitting the Fact to be proved, as the Petitioners would have it, that Wooll from *Newcastle* is ordinarily lashed on the outsides of Ships, yet that is by no Means relevant to bar the Respondents Claim for Loss sustained thereby, unless the Petitioners can likewise show, that in the mercantile Practice, where such Loss has happened, it has been sustained by the Proprietor of the Wooll, and not the Master or Freighter: This, 'tis believed however they will not pretend to; while, on the contrary, a late Case is mentioned in the Respondent Mr. *Frazer's* Answers to the Petitioner's Condescen-
dence.

dence, *Art. 6.* where several Packs of Wooll, belonging in Part to *William Couper* the Petitioner's own Father, was lost off the Deck or Quarters of the Ship, the *Providence of Aberdeen*, the Value of which was paid to him and Mr. *Middleton* the other Proprietor, by the Master and Owners of the Vessel; and as the Respondent had his Information from the said Mr. *Middleton*, and the Truth of it has not been denied by the Petitioner Mr. *Couper*, whose Father is still alive, it must be considered by your Lordships as a Precedent exactly in Point to the present Case.

In short, the Universality of this Practice amongst Shipmasters of lashing Wooll in that Manner, however great, can never be a Justification of the Petitioners, so as to exempt them from Damages. Malversations in the Exercise of Duty, however generally and successfully practised, will never alter the Nature of Right and Wrong; and as long as mercenary People find their Account in the general Success of a bad Practice, they will not easily throw it aside, although they run the Risk of its sometimes failing. Merchants, upon particular Occasions, may be willing to run the Risk of having their Goods exposed in this Manner, when they cannot get them otherwise transported; and Shipmasters, tempted by a high Freight, may be disposed to take the Risk upon themselves; but Abuses of any Kind will never be sufficient to overthrow the general Rules and Principles of Law.

The Petitioners then have no Reason to exult over what they are pleased to hold as an Admission of this general Practice in the Respondents Answers to their Condescendence. The Respondents will be forgiven to say for themselves, that actuated by no stronger Motive than the Love of Truth and Justice: They have there told plainly all that they knew, whatever might be its Effect, but they humbly apprehend that nothing they have there said, however wrested, can answer the Petitioners Purpose.

Your Lordships will observe, that with Regard to the Practice

' Practice of stowing Wooll on the Decks, or lashing it to the Sides
 of the Ships, the Respondents acknowledge no more than that
 ' they have *sometimes* seen Wooll from *London* and *New-*
 ' *castle* stowed in that Manner, and that then they always
 ' looked on the Master and Freighter to be liable for the Loss,
 ' if any happened, for this very good Reason, ' That they
 ' never knew less Freight paid for Wooll stowed upon the
 ' Deck, and lashed to the Ship-side and Quarters, than for what
 ' was stowed under Deck ; and if the Practice was otherwise,
 ' it would be easy for Ship-masters, and their Owners and
 ' Freighters, for the Greed of a few Pounds, to make the Proprie-
 ' tors of Wooll run the Risk of 100 *l. Sterling* and upwards,
 ' which would be of the most dangerous Consequence, especi-
 ' ally as the Ship-master has it in his Power to stow the Wooll
 ' of those he favours under Deck, and the Wooll of those he
 ' does not favour above the Deck, and without the Ship's Side
 ' and Quarters, adding, that they heard that Ship-masters
 ' and Freighters were always liable for the Loss of Wooll
 ' so stowed, and in all Cases of such Loss, the Value made up
 ' to the Sufferers.'

Such is the Account the Respondents give of this Pra-
 ctice, which is far from supporting the Petitioners Plea of Uni-
 versality, as there is not the smallest Evidence in Process,
 or offered to be brought by the Petitioners, that where
 Wooll so stowed was lost, the Damage was sustained by
 the Proprietors; and without a Proof of that Circumstance, the
 Practice however general, proves no more than the Avarice and
 Rashness of those who use it; and this Fact mentioned by the
 Respondents, and admitted by the Petitioners, that the same
 Freight is paid for Wooll lashed overboard, as that lodged in
 the Hold, affords a convincing Argument, that the Risk is in
 such Cases run by the Master or Freighter, excepting where the
 contrary is expressly agreed; for it is impossible to suppose that
 any Man, much less a Merchant, or Person of Experience, would
 be so mad as to permit his Goods to be exposed in a Place of
 imminent Danger, and consent to pay as high Freight for them
 as if they were lodged in the Hold, a Place of absolute Safety,
 when compared with the Stowage on the outside of a Ship.

D. And

And agreeable to this, the Respondent Mr. *Frazer*, after telling that he sometimes expressly gave Orders or Allowance to stow his Wooll upon Deck, or lash the same to the Sides of the Ship, and in one Case agreed to run the Risk, adds, 'that he then paid less Freight for what was above Deck than what was under; and he likewise tells your Lordships, that in the Year 1750, when he himself had freighted a Ship at *Newcastle*, he refused to take aboard some Wooll belonging to a Friend of his own, (*Hary Tytler*) and lodge it above Deck, even within the Rails, unless he would run the Risk of it.' So that on the whole it is obvious, that there is no Occasion for allowing a Proof of the general Practice of stowing Wooll above Deck, or on the outside of Ships, as *frustra probatur, quod probatum non relevet*, supposing that Practice to be universal, it is undisputable, that in all Cases, the Risk of Wooll so stowed, must ly on the Master and Owners who presume to place it in that dangerous Situation, unless either it is so stowed by the express Direction of the Proprietors, or they, by a positive Bargain agree, to relieve the Master or Owners of that Risk.

And this leads to the last Point argued by the Petitioners, which indeed is the only one that carries any Appearance of Relevancy, to wit, 'that the Wooll in Question was shipped by the Pursuers Correspondents, and stowed in their Presence without any Objection made by them.' With regard to which the Respondents apprehend, that at least no Evidence hitherto appears of that Fact; for as to the Depositions of *Chapman* and *Tindal* referred to by the Petitioners, they go no further than saying, 'they saw some Gentlemen whom they supposed to be Skinners, assisting the Labourers to roll aboard the Vessel, the Wooll that was to be stowed on their Deck, and that when the Wooll was so stowed, they saw the said Gentlemen on the Key, and heard them make no Objection;' and *Ord* the Master, who only swears as to their viewing the Ship and computing her Contents, describes them as *Persons unknown to him*: So as there is not the smallest Evidence that these Persons were the Respondents
Cor-

Correspondents : Neither is there any Proof that they, whoever they were, gave any Authority to the Master or Freight-er for lashing the Wooll on the outside of the Ship.

Nor does *Ilderston's* or *Bruce's* Affidavit, mentioning, ' *that they shipt* the said Wooll on board the Petitioners Vessel, ' and that at the Time of *shipping* the same, *Couper* the Freight-er promised to *Bruce* to take a particular Care of it, ' prove that either of them were present at the Time of the Stowage, for, taking the Word *Shipping*, in the Petitioners literal Sense, to mean the very actual Attendance and Assistance at putting the Wooll on board the Vessel, yet any Conclusion from that is taken off by the Oaths of both the Master and Mariners, who agree that the Wooll was not stowed on Deck or lashed over board till the Day after it was shipt; and your Lordships will also observe, that this Allegation of the Petitioners has been from the Beginning of this Cause positively denied by the Respondents; and although a Proof of it was allowed the Petitioners by the Lord Ordinary's first Interlocutor, yet they did not chuse to attempt it, well knowing they must have failed; and so contented themselves with putting an Interrogator to the Respondents, ' Whether or not their Correspondents at *New-castle* signified by their Letters that they had seen the Wooll ' shipt there for their Behoof? To which both of them answered directly in the *Negative*. Mr. *Duncan* adding, *that he knows it is not usual for them to stand beside, and see Goods shipt.*

The Respondents therefore hope that your Lordships will even be satisfied from the Evidence in Process, that these Gentlemen gave no Manner of Countenance, much less Authority, to the Petitioners stowing the Wooll in the Manner that occasioned its Loss; and on the contrary, supposing what the Petitioners alledge to be true, yet *frustra probatur*, it is not relevant to assoilzie them from this Action; for granting the above Gentlemen to have been present, without objecting at lashing the Wooll over board, and that the other Point urged by the Petitioners were likewise true, namely, the general Practice of stowing Wooll in that Manner, must not your Lordships still conclude, they gave themselves no Trouble about it,
from

from the Consideration of the Master and Freighters being liable to the Proprietors, for any Damage the Wooll so stowed might sustain? It is not the Merchant's Business to advert to the Stowage of the Goods; when they are once fairly delivered over to the Master or Freighters, they only are liable. And in short, the Petitioners prove nothing, unless they make it appear, that the Persons who shipped the Wooll, expressly agreed to run the Risk of so much thereof as was lashed to the Outside of the Ship; but this they never yet offered to undertake, tho' it was put to them by the Judgment of the Magistrates of *Aberdeen*.

The Respondents must now beg your Lordships Forgiveness for the Length of this Paper, occasioned by the Importance of the Cause, not only to themselves, but likewise to all Merchants whatever, who, should the Petitioners prevail, must ly at the Mercy of every Shipmaster or Freighters, as to the Security of their most precious Effects. The Trade of *Aberdeen*, particularly in the Article of Wooll, every body knows, is a most valuable Branch of Traffick; and were the Persons employed in its Carriage, discharged from all Attention to the Merchants Interest, the dangerous Consequences are apparent. The Respondents therefore humbly hope, that your Lordships will particularly attend to its Concerns; and now that this Cause is fully laid open, they flatter themselves your Lordships Interlocutor will be final, and that you will not suffer it to be unnecessarily protracted, by allowing the Petitioners a further Proof of Facts that have no Manner of Relevancy in them; more especially when it is considered, that both Parties positively agreed to put the Issue of the Case upon the Evidence contained in the Condescendence and Answers; and that all the Proof the Petitioners now offer to adduce, was allowed them by the Ordinary no less than five Years ago, when instead of attempting it, they had Recourse to these Condescendences; and since that Method of Proof was acquiesced in by the Respondents, it will be extremely hard to involve them in a fresh one, which to all Appearance may put them off some Years longer, to no better Purpose than the former.

In respect whereof, &c.

DAV. RAE.

